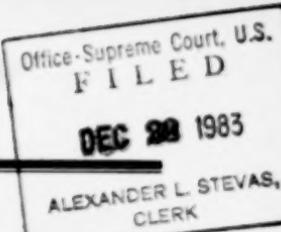


No. 83-103



IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WOOKRAFT DIVISION/GEORGIA KRAFT COMPANY,
Petitioner,
v.

NATIONAL LABOR RELATIONS BOARD and LABORERS'
INTERNATIONAL UNION OF NORTH AMERICA,
AFL-CIO, LOCAL 246,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION AS
AMICUS CURIAE FOR PETITIONER

REX H. REED*
STUART A. ROSENFELDT
*Attorneys for the National Right to
Work Legal Defense Foundation*
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

* Counsel of Record

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICUS CURIAE</i>	1
PURPOSE OF THIS BRIEF	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Taft-Hartley Congress Intended To Protect Non-Striking Employees From Coercive Reprisals By Employees On Strike.	4
II. Rulings Of The National Labor Relations Board Tend To Undermine Congressional Intent	5
III. In The Current Controversy, NLRB Subversion Of Congressional Intent Is Apparent	9
IV. The Third Circuit's Objective Test Is Superior To The NLRB's In That It More Closely Ap- proximates Congressional Intent	13
CONCLUSION	16

TABLE OF AUTHORITIES

	Cases	Page
Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977)	12-13	
Berkshire Knitting Mills, 46 N.L.R.B. 955 (1943)	8	
Coronet Casuals, Inc., 207 N.L.R.B. 304 (1973)	6	
Firestone Tire & Rubber Co., 187 N.L.R.B. 54 (1970) .	6	
Georgia Kraft Co., 258 N.L.R.B. No. 121 (1981)	9	
Limestone Apparel Corp., 225 N.L.R.B. 722 (1981) ..	6	
Local 542, Int. Union of Oper. Eng. v. NLRB, 328 F.2d 850 (3d Cir. 1964)	12	
NLRB v. W. C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977)	11-13	
NLRB v. Pepsi-Cola Co., 496 F.2d 226 (4th Cir. 1974).	14	
NLRB v. Trumball Asphalt Co., 327 F.2d 841 (8th Cir. 1964)	14	
Southern Fla. Hotel & Motel Ass'n, 245 N.L.R.B. 561 (1980)	6, 7	
Star Meat Co. v. NLRB, 105 L.R.R.M. 3144 (6th Cir. 1980)	6, 8	
Terry Coach Industries, 166 N.L.R.B. 560, <i>enf'd</i> , 411 F.2d 612 (9th Cir. 1969)	6	
Wyman-Gordon Co., 62 N.L.R.B. 561 (1945)	8	

Statutes

United States

29 U.S.C. § 157	<i>passim</i>
29 U.S.C. § 158(a)(1)	8, 11
29 U.S.C. § 158(a)(3)	8, 9, 11

TABLE OF AUTHORITIES—continued

	Page
29 U.S.C. § 158(b)(1)	10
29 U.S.C. § 158(b)(1)(a)	3, 5, 10, 12
29 U.S.C. § 158(c)	5, 7
29 U.S.C. § 160(c)	3, 5, 6, 7
 Georgia	
GA. Code 54-801	15
GA. Code 54-804	15
 Miscellaneous	
<i>Legislative History of the Labor Management Relations Act, 1947</i>	<i>passim</i>
Thieblot, Jr., Armand, J. and Haggard, Thomas R., <i>Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB, 1983</i>	2
[1947] U.S. Code Cong. & Ad. News	10

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INTEREST OF *AMICUS CURIAE*

As part of its program, the National Right To Work Legal Defense Foundation provides free legal aid to individual employees who suffer from acts of violence, intimidation, harassment and coercion on account of their decisions to refrain from participating in strike activity. In addition, the Foundation has maintained a computerized listing of newspaper

reports from around the country detailing acts of union violence from 1975 to the present date. This data base¹ reveals that the number of incidents of union violence perpetrated against nonstrikers has risen to an alarming level.

Resolution of the issues in this case will have major ramifications on the rights of nonstriking employees because it will determine the extent to which an employer may protect nonstrikers in the exercise of their rights guaranteed by § 7 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 157.

PURPOSE OF THIS BRIEF

The Foundation's brief *amicus curiae* addresses the question of whether Congress intended § 7, 29 U.S.C. § 157, to protect acts of intimidation by strikers against nonstrikers when those intimidating acts were unaccompanied by physical gestures.

In addition, the Foundation's brief will address the ramifications of the NLRB's refusal to countenance the rights of nonstrikers to be free of fear and intimidation.

¹ Armand J. Thieblot, Jr. and Thomas R. Haggard used the Foundation data base in their recent book entitled, *Union Violence: The Record and the Response by Courts, Legislatures, and the NLRB*, 1983, University of Pennsylvania Press. This book, especially Chapter 10, was a great resource to amicus in preparing this brief. A copy of the book is being provided to the Clerk of this Court as a reference for the Court.

SUMMARY OF ARGUMENT

The primary purpose of the Taft-Hartley amendments to the Labor Management Relations Act was to promote an environment in which labor peace and tranquility could be fostered. One of the means chosen to achieve this goal was to grant employees the right to be free of violence, threats and coercion. The change in the language of § 7 and the addition of § 8(b) (1)(A) were intended to guarantee this freedom. In addition, § 10(e) was added to make it clear that employers have the right to discharge employees who participate in violent and coercive acts.

The National Labor Relations Board has been remiss in effectuating this congressional intent. Rather, it has operated with an institutional bias *in favor of* violence against employees who exercise their § 7 rights to refrain from striking. This bias is revealed in the present case where the NLRB has ordered an employer to reinstate striking employees who visited the home of a non-striker and threatened him with bodily injury.

The NLRB's adoption of an "overt act or gesture" standard for determining the reinstatement rights of strikers who threaten non-strikers is unduly mechanistic. This NLRB standard fails to respect the § 7 rights of non-strikers to be free of fear and intimidation.

The "objective" standard adopted by the Third Circuit is a much closer approximation of congressional intent. That standard respects the rights of strikers and non-strikers alike. In addition, adoption of the "objective" standard will tend to promote the predominant goal of the nation's labor laws; the pursuit of labor peace.

ARGUMENT

I. The Taft-Hartley Congress Intended To Protect Non-Striking Employees From Coercive Reprisals By Employees On Strike.

A reading of the legislative history of the Taft-Hartley Amendments demonstrates how far the NLRB and courts have drifted from the intentions of Congress in passing the LMRA. The amendments were enacted to impose curbs upon various coercive union activities and upon NLRB interpretations of the original National Labor Relations Act which Congress perceived as tending to encourage those coercive activities. Specifically, Congress found that:

For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. . . .

The employer's plight has likewise not been happy. . . . He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. . . . He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism.²

² SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, H.R. REP. NO. 245, 80th CONG., 2d Sess. *reprinted in LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947*, at 295-96 (Comm. Print 1974) [hereinafter cited as LEGIS. HIST. LMRA].

The means chosen by Congress to alleviate these abuses were: to grant employees the right to *refrain* from union activities³; to prohibit unions from coercing employees in their right to refrain from such activities (including, but not limited to, a ban on union violence against employees)⁴; a limitation on the NLRB's power to order employers to reinstate employees who engage in misconduct⁵; and a guarantee of free speech to both employers and employees.⁶ The degree to which NLRB interpretations of these provisions varies from congressional intent is striking in the present controversy.

II. Rulings Of The National Labor Relations Board Tend To Undermine Congressional Intent.

The NLRB has deviated immensely from Congressional intent with regard to interpretation of § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a). It is clear that Congress intended that provision to outlaw all forms of union violence, *especially during a strike*.⁷ Yet, the NLRB has almost always taken a more lenient view towards violence during a strike than on other

³ NLRA § 7, 29 U.S.C. § 157.

⁴ NLRA § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a).

⁵ NLRA § 10(e), 29 U.S.C. § 160(e).

⁶ NLRA § 8(c), 29 U.S.C. § 158(c).

⁷ See 93 CONG. REC. 6540 (1947) (rem. of Rep. Hartley) reprinted in LEGIS. HIST. LMRA, 1947, at 881-83. See also 93 CONG. REC. at 4563 (rem. of Sen. Taft), 6548 (rem. of Rep. Halleck), LEGIS. HIST. LMRA at 1208, 897-98.

occasions.* Furthermore, Congress had a broad conception of violence in mind, including threats and harassment as well as outright violent acts.⁹ Yet, the NLRB has consistently allowed certain kinds of violence during a strike to occur, paying lip service to the illegality of those acts but forbidding employers from exercising their statutory and common law right to discharge employees who have engaged in those kinds of violence.¹⁰ This in spite of the fact that Congress specifically intended that "[a]ny employees participating in (violence, threats, harassment) may certainly be discharged for cause and are not entitled to reinstatement."¹¹

The NLRB has, in effect, ignored the amendment to § 10(c) which provides ". . . no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause."¹² In spite of this language, the NLRB still retains the attitude that:

* *Coronet Casuals, Inc.*, 207 N.L.R.B. 304 (1973), *Terry Coach Industries*, 166 N.L.R.B. 560, *enf'd*, 411 F.2d 612 (9th Cir. 1969).

⁹ 93 CONG. REC. 4142, 4563 (rem. of Sen. Taft) LEGIS. HIST. LMRA at 1025, 1208; S. REP. NO. 105, 80th Cong., 1st Sess. 50 (1947) reprinted in LEGIS. HIST. LMRA, 456.

¹⁰ *Star Meat Co. v. NLRB*, 105 L.R.R.M. 3144 (6th Cir. 1980); *Southern Fla. Hotel & Motel Ass'n.*, 245 N.L.R.B. 561 (1980); *Limestone Apparel Corp.*, 225 N.L.R.B. 722 (1981); *Firestone Tire & Rubber Co.*, 187 N.L.R.B. 54 (1970).

¹¹ 93 CONG. REC. 7495, LEGIS. HIST. LMRA, 544, 546 and 912, and [1947] U.S. CODE CONG. & AD NEWS 1135, 1164-65.

¹² 29 U.S.C. § 160(c).

The Board and courts have consistently ruled that not every act of misconduct committed during a strike deprives an employee of the Act's protection. Although an employee may have engaged in misconduct, he or she may not be deprived of reinstatement rights absent a showing that the conduct was so violent or of such a serious nature as to render an employee unfit for future service. (Footnote omitted).

Southern Fla. Hotel & Motel Ass'n, 245 N.L.R.B. 561, 564 (1980).

This attitude that misconduct during a strike is, somehow, more protected than at other times is in stark contrast to the congressional intent that the §10(e) limitations on the NLRB's reinstatement power "applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity."¹³

It is indisputably clear that Congress intended *all* acts of violence by employees, during a strike or not, to take employees out of the protection of the Act and, thus, subject employees to discharge by the employer for cause. This absolute loss of immunity is subject to only two exceptions. First, the "free speech" provisions of §8(e), 29 U.S.C. §158(e), establish a limited right of employees to engage in harsh or even obscene language, so long as that language is not a threat. Second, if the General Counsel can demonstrate that the employee's misconduct was merely a pretext by the employer for ridding itself

¹³ H.REP. No. 510, 80th Cong., 1st Sess., reprinted in LEGIS. HIST. LMRA at 543, [1947] U.S. CODE CONG. & AD. NEWS at 1145.

of a pro-union employee, then relief under § 8(a)(3) can be had.¹⁴

However, the NLRB has subverted this congressional intent by framing the issue and allotting the burden of proof in a manner that presumes that employees are immune from discharge for strike misconduct on account of § 8(a)(1), 29 U.S.C. § 158(a)(1) unless the employer can demonstrate that the employee's misconduct was sufficiently egregious to "remove him from the protection of the Act."¹⁵ The cases that originally enunciated this "minor violence test"¹⁶ were expressly criticized by the House of Representatives.¹⁷ After calling the NLRB's reasoning "asinine", the House Report went on to note:

The change made in Section 10(E) [sic] on this subject is intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to . . . engage in incivilities and other disorders and misconduct.

LEGIS. HIST LMRA at 333.

¹⁴ 29 U.S.C. § 158(a)(3).

¹⁵ *Star Meat Co.*, *supra* p. 6, at 105 L.R.R.M. 3145.

¹⁶ *Berkshire Knitting Mills*, 46 N.L.R.B. 955 (1943); *Wyman-Gordon Co.*, 62 N.L.R.B. 561 (1945).

¹⁷ H.R.REP. No. 510, 80th Cong., 1st Sess. *reprinted in LEGIS. HIST LMRA* 543; H.R.REP. No. 245, 80th Cong., 2nd Sess. *reprinted in LEGIS. HIST LMRA* at 333.

III. In The Current Controversy, NLRB Subversion Of Congressional Intent Is Apparent.

The NLRB's subversion of congressional intent is especially evident in "threat" cases like the one at issue here where two employees visited the home of a non-striker and confronted him (along with his pregnant wife and child) with obscene language and threats to "take care of" the nonstriker if he returned to work.¹⁸ The Administrative Law Judge found that the strikers had threatened the nonstriker with bodily injury. On review, the NLRB decided that the threat to "take care of" the nonstriker was "ambiguous" and that since the threats were "unaccompanied by violence or physical gestures," the Board considered them an "isolated incident of verbal harassment,"¹⁹ and, thus, ordered the employer to reinstate them. It is significant to note that neither the Administrative Law Judge nor the NLRB found that the employer had shown anti-union animus sufficient to bring § 8(a)(3), 29 U.S.C. § 158(a)(3) into play.

Amicus submits that this "overt acts" test is unduly mechanistic and tends to *encourage* harassment of non-strikers by strikers. In effect, the Board's policy of refusing to allow the discharge of a striker on account of threatening statements (absent overt acts) to non-strikers provides a "roadmap" which strikers may follow to pursue their illegal goal (of coercing non-strikers in the exercise of their right to refrain from concerted strike activity), yet escape the threat of lawful discharge. Moreover, in the case

¹⁸ *Georgia Kraft Co.*, 258 N.L.R.B. No. 121, Appendix p. A66.

¹⁹ *Id.*, Appendix p. A40.

of a non-striker who has been threatened, the "overt acts" test fails to countenance *his* § 7 right *to be free of* violence and harassment.

While it could be argued that § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(a), was intended as a non-striker's remedy to striker coercion, that remedy, by definition, cannot apply to *individual* acts of misconduct. Besides, the agency problem may be insurmountable and injunctive relief is too little and too late. Most importantly, the deterrent effect of an employer's threat of discharge is a much more potent protection for the non-striking employee.

It is made repeatedly clear in the legislative history that Congress considered coercive conduct by individuals, which would be an unfair labor practice if committed by a union, to be just cause for discharge of an individual participant.²⁰ In its discussion of the amendments to §§ 7 and 8(b)(1)²¹, the House Conference Report stated ". . . obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act."²² As if to emphasize this point, the Report later states "an employee who is discharged for participating in (8(b)(1) violations) will not, . . . be entitled to reinstatement."²³

²⁰ 93 CONG. REC. at 7495, LEGIS. HIST LMRA at 912, *supra* note 2 at 544, 546 and [1947] U.S. CODE CONG. & AD. NEWS 1135, 1164-65.

²¹ 29 U.S.C. §§ 157 and 158(b)(1).

²² H.R.REP. No. 510, 80th Cong. 1st Sess. (1947) *reprinted at* LEGIS. HIST LMRA at 544.

²³ *Id.* at 546.

The only existing test for determining whether a misbehaving employee has overstepped the bounds of § 7 that comports with this principle is the "objective standard" enunciated by the Third Circuit Court of Appeals.²⁴ In that case, verbal threats such as "we'll get you," and "you're going to get yours," were made to a non-striking employee by striking employees. *Id.* at 526. The employer denied reinstatement to the striking employees and the union filed unfair labor practice charges alleging violation of §§ 8(a)(1) and (3). The case was before the Third Circuit Court of Appeals on the Board's petition for enforcement of its order issued against the employer.

The Board had applied its "physical acts or gestures" standard, finding that the strikers "did not engage in conduct sufficiently egregious to deprive them of the protection of the Act" because the verbal threats were "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to their words sufficient to warrant finding that they should not be reinstated to their jobs at the strike's conclusion." *Id.* at 527.

The Third Circuit stated flatly that "the Board applied an erroneous standard." *Id.* The court explained that while recognizing "that it is the primary responsibility of the Board and not of the courts 'to strike the proper balance between the asserted business justifications and the invasion of employee rights'", it did not believe that an employer must countenance conduct that amounts to intimidation and threats of bodily harm. *Id.* "Threats are not

²⁴ *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977).

protected conduct under the Act, and we fail to see how a threat acquires protected status simply because it is unaccompanied by physical acts or gestures." (Footnotes omitted). *Id.*

The court chose instead to adopt the same standard it had used in cases of union coercion and intimidation,²⁵ believing that "this standard which this Circuit has adopted in the closely analogous situation of § 8 (b)(1)(A) violations, is equally applicable to threats and intimidation by individual strikers." *Id.* at 528.

The objective standard was stated as follows:

That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. *The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.*

Id. (Emphasis added).

Further support for the objective standard is found in *Associated Grocers of New England v. NLRB*, 562 F.2d 1333 (1st Cir. 1977). The employer petitioned for review of the Board's order that striking employees who "verbally threatened strikebreakers"²⁶

²⁵ See *Local 542, Int. Union of Oper. Eng. v. NLRB*, 328 F.2d 850 (3d Cir. 1964).

²⁶ One striker approached three job applicants in the presence of forty to fifty pickets and told them not to go through the picket line if they "valued their lives." *Associated Grocers*, 562 F.2d at 1336.

and who "in an intimidating fashion, followed a supervisor home in an auto at night" should be reinstated to their pre-strike positions with back pay. *Id.* at 1335. In ordering reinstatement, the ALJ (affirmed by the Board) had applied the Board's "overt acts" standard. While recognizing that the Board is entitled to considerable deference in its determination of the scope of § 7, the First Circuit nevertheless agreed with the Third Circuit in *McQuaide* that the Board's formulation was "too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity" in that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." *Id.* at 1336.

The First Circuit ultimately declared a complete departure from the Board standard, stating that "[w]hile the presence of physical gestures accompanying a verbal threat may be probative of the threat's seriousness, we think the Board commits legal error insofar as it hinges the protections of § 7, entirely on the presence or absence of physical gestures." *Id.*

IV. The Third Circuit's Objective Test Is Superior To The NLRB's In That It More Closely Approximates Congressional Intent.

In *McQuaide, supra*, the Third Circuit also rejected the other two prevalent tests of whether threats constitute sufficient misconduct to remove an employee from the protections of § 7. Those tests examine either the subjective "intent" of the discharged

striker²⁷ or the subjective "effect" upon the threatened employee.²⁸

Neither of these subjective tests comports with the congressional intent that coercive conduct which would be an unfair labor practice if engaged in by a union is also to be considered unprotected insofar as the individual participants are concerned.²⁹ The subjective "intent" test is not sufficiently protective of the rights of employee victims of violence. It is always difficult to prove intent, especially that of another individual. In the context of verbal threats, the burden of proving the intent of the threatmaker becomes all the more difficult, thus diminishing the deterrent effect of a threat of discharge. The subjective "effect" test is, likewise, unfair to the victims of threats because it does not countenance their right to be free of coercion. It only affords nonstrikers the

²⁷ See *NLRB v. Pepsi-Cola Co.*, 496 F.2d 226 (4th Cir. 1974) (striker approached prospective job-seeker and said "I know where you live, and if you go in there to work, I'll come looking for you." The court said that while "[r]ecognizing that some confrontations between strikers and nonstrikers are inevitable, we have drawn the line at conduct that is intended to threaten or intimidate nonstrikers. . . . [the striker's] words crossed the line from persuasion to threats and intimidation.")

²⁸ See *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841 (8th Cir. 1964) (strikers told nonstriking employee that he "had better have good window breakage for his car" and that if he didn't quit work "the rest of the Union guys would get him." This was found not to be protected activity in that it was "sufficiently obstructive and threatening to place [the nonstriking employee] in fear of bodily harm and to cow him to the extent that he stayed away from his job for five weeks.")

²⁹ See nn. 20-23 and accompanying text.

right to be free of *very effective* coercion. This test, like the NLRB's "overt acts" test fails to give due regard to the right of nonstrikers to be free of fear.

It is established in tort law that verbal threats alone can result in serious injury in the form of mental distress. The Board standard fails to recognize that intimidating words, whether or not they are accompanied by physical gestures, may restrict a nonstriking employee from fully exercising *his* rights under § 7.³⁰ Section 7 is obviously designed to establish and protect the rights of *both* striking and non-striking employees. The Board unduly alters the balance of these potentially conflicting rights when it considers verbal threats to be a permissible means by which to assist labor organizations. If the purpose of § 7 is to be effectuated, an employee exercising his right to strike cannot, by doing so, infringe upon another employee's right to *refrain* from union-related activity. The right to refrain should include

³⁰ The Georgia legislature has obviously recognized this possibility: see Georgia Code § 54-801 (It shall be unlawful for any person acting alone or in concert with one or more persons, by the use of force, intimidation, violence, or *threats thereof*, to prevent or attempt to prevent any individual from quitting or continuing in the employment of, or from accepting or refusing employment by, any employer, or from entering or leaving any place of employment of such employer) and § 54-804 (It shall be unlawful for any person, acting alone or in concert with one or more other persons, to compel or attempt to compel any person to join or refrain from joining any labor organization or to strike or *refrain from striking against his will*, by any *threatened or actual interference* with his person, immediate family, or physical property, or by any *threatened or actual interference* with the pursuit of lawful employment by such person, or by his immediate family) (*emphasis added*).

the right to refrain with peace of mind and, if not without harassment in the form of heckling or verbal abuse, at least without threats to safety or even life. As the agency charged with the primary responsibility of maintaining labor peace, the Board has a duty to interpret § 7 in such a way that *all* employees' rights are protected. By endorsing a "physical acts" standard of misconduct, the Board is tipping the balance in favor of striking employees at the expense of nonstriking employees.

CONCLUSION

The only standard of analysis that effectively promotes this balance is the "objective test" advocated by the First and Third Circuits.

REX H. REED*

STUART A. ROSENFELDT

Attorneys for the National Right to

Work Legal Defense Foundation

8001 Braddock Road, Suite 600

Springfield, Virginia 22160

(703) 321-8510

* Counsel of Record